

Date Signed: August 5, 1998

Federal Register/Vol. 63, No. 150/Wednesday, August 5, 1998/Notices pp. Page 41939-41946
 Part VI: Environmental Protection Agency, *SDWA Section 1401(4) Public Water System Definition as Amended by 1996 SDWA Amendments; Notice.*

ENVIRONMENTAL PROTECTION
AGENCY

[FRL-6136-7]

Definition of a Public Water System in
SDWA Section 1401(4) as Amended by
the 1996 SDWA Amendments

AGENCY: Environmental Protection
Agency.

ACTION: Notice.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is announcing issuance of guidance on "Definition of a Public Water System in SDWA Section 1401(4) as Amended by the 1996 SDWA Amendments." The guidance is published as an Appendix to this notice.

FOR FURTHER INFORMATION

CONTACT: The Safe Drinking Water Hotline, toll free (800) 426-4791, or Jon Merkle, telephone (415) 744-1844.

SUPPLEMENTARY INFORMATION:

Background

The definition of a "public water system" (PWS) is central to delineating the scope of many Safe Drinking Water Act (SDWA) requirements. The 1996 amendments to the SDWA broadened the definition of "public water system" to include systems providing water for human consumption that deliver this water by "constructed conveyances", such as irrigation canals. Prior to the 1996 amendments, the SDWA defined the term public water system to include only piped water systems. The guidance published today is intended to interpret the new statutory language and provide guidance on this interpretation and suggested implementation to EPA Regions and States with primary enforcement responsibility for the PWS program.

The Agency published a draft of this guidance in the **Federal Register** on May 8, 1998. The Agency solicited comments on the draft guidance and, after consideration of numerous comments on the draft guidance, the Agency prepared the final guidance which is being published today. EPA has prepared a detailed response to comment document, which is available upon request and which will be posted on EPA's Office of Ground Water and Drinking Water Homepage, which can be accessed at www.epa.gov/ogwdw.

Dated: July 31, 1998.

J. Charles Fox,

Acting Assistant Administrator for Water.

Appendix--Definition of a Public Water System in SDWA Section 1401(4) as Amended by the 1996 SDWA Amendments

Table of Contents

Introduction
Background
Application of Section 1401(4)
I. Systems Newly Defined As Public Water Systems
A. Statutory Language
B. Interpretation of "Constructed Conveyance"
C. Identification of Public Water Systems Under the Revised Definition
II. The Exclusions in Section 1401(4)(B)(i)
A. Statutory Language
B. Application of Section 1401(4)(B)(i)
1. The "Other Than Residential Uses" Exclusion
2. The Alternative Water and Treatment Exclusions
The Alternative Water Exclusion
The Treatment Exclusion
III. The Exclusion in Section 1401(4)(B)(ii) for Certain Piped Irrigation Districts
Questions & Answers
Disclaimer

Introduction

This document provides guidance to the primacy agencies¹ and the U.S. Environmental Protection Agency's (EPA's) regional offices in their implementation of the Safe Drinking Water Act's (SDWA) 1996 amendments to the definition of a public water system (Section 1401(4)).

This document incorporates and replaces the preliminary guidance on this topic issued December 6, 1996, by Assistant Administrator for Water Robert Perciasepe entitled "Safe Drinking Water Act Amendment to Public Water System Definition." It is a collaborative effort between the Office of Water and the Office of Enforcement and Compliance Assurance (OECA). OECA has concurred with the contents of this document and will incorporate and implement it through its enforcement and compliance assurance directives and operating protocols.

Background

The term *public water system* (PWS) is central to delineating the scope of many SDWA requirements. Prior to the 1996 SDWA amendments, Section 1401 of the SDWA defined a public water system as "a system for the provision to the public of piped water for human consumption if such system has at least fifteen service connections or regularly serves at least twenty-five individuals." In *Imperial Irrigation District v. United States Environmental Protection Agency*, 4 F.3d 774 (9th Cir. 1993), the court ruled that the SDWA provisions governing PWSs did not apply to an irrigation district supplying residences, schools and businesses with untreated water through open canals. In response, Congress changed the definition of public water system to regulate under the SDWA "water [provided] for human

¹ Primacy agency refers to either the EPA or the State or the Tribe in cases where the State or Tribe exercises primary enforcement responsibility for the public water systems.

consumption through pipes or other constructed conveyances." This change reflected Congress' understanding that the human consumption of such untreated canal water could constitute a significant risk to public health, and that appropriate measures were warranted to provide consumers of this water with a level of health protection equivalent to that from drinking water standards. At the same time, Congress provided several means by which certain water suppliers could be excluded from this definition, and provided that systems newly subject to SDWA regulation under this amended definition would not be regulated until August 6, 1998.

The amended Section 1401(4) does several things. First, effective August 6, 1998, Section 1401(4)(A) expanded the definition of a PWS to include suppliers of water for human consumption that deliver their water through canals and other constructed conveyances. Second, Section 1401(4)(B)(i) supplies methods by which connections to these newly defined PWSs will not be considered "connections" if the systems or users at these connections have taken specific actions to ensure protection of public health. If, after the systems or users have taken these specific actions to ensure protection of public health, and as a consequence of such actions, the systems are no longer regarded as serving at least 15 service connections or 25 individuals, the systems will not be considered to be PWSs. Third, Section 1401(4)(B)(ii) also allows certain piped irrigation districts to no longer be considered public water systems if the districts or their users take specific actions to ensure public health.

As promised in the December 6, 1996 guidance, EPA convened an EPA- State work group to develop more detail on the interpretation and application of this new definition. State members of this work group included drinking water program representatives for Arizona, California, Georgia, Idaho, Texas and Washington. The work group consulted with thirteen individual irrigation water suppliers and irrigation trade associations within these States. The workgroup also consulted with six organizations involved with community-based minority health and welfare issues and interviewed three persons who use canal water for human

consumption. EPA published a draft of the guidance on May 8, 1998 (see 63 FR 25740-46), considered public comments on the draft, and made changes based on the public comments.

Application of Section 1401(4)

I. Systems Newly Defined as Public Water Systems

A. Statutory Language

As described above, effective August 6, 1998, Section 1401(4)(A) of the SDWA² expanded the definition of a PWS to read as follows:

The term *public water system* means a system for the provision to the public of water for human consumption through pipes or other constructed conveyances, if such system has at least fifteen service connections or regularly serves at least twenty-five individuals. Such term includes

- (i) any collection, treatment, storage and distribution facilities under control of the operator of such system and used primarily in connection with such system, and
- (ii) any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system.

This revised definition broadens the means for delivering water that will qualify a water supplier³ as being a public water system from pipes to "pipes or other constructed conveyances." Thus, as of August 6, 1998, in accordance with this provision and EPA's regulations, water systems providing water for human consumption through constructed conveyances to at least fifteen service connections or an average of twenty-five individuals daily at least 60 days per year are defined as public water systems subject to SDWA regulation. See 40 CFR Sec. 141.2. EPA has interpreted the term *human consumption* to include drinking, bathing,⁴ showering, cooking,

²All references in this Guidance to Section 1401 refer to Section 1401 of the SDWA.

³As used in this Guidance, and as indicated in Section 1401(4)(C), the term water supplier broadly refers to any water provider that may be subject to regulation as a public water system under the SDWA. This term should not be confused with supplier of water, which is defined in the SDWA as "any person who owns or operates a public water system". See SDWA Section 1401(7)

⁴EPA interprets the term "bathing" to mean use of water for personal hygiene purposes in a home, business setting, school, etc. The term "bathing" does not refer to situations such as (1) swimming in an open canal or (2) incidental, casual contact with water from an open canal in connection with outdoor activities such as agricultural

dishwashing, and maintaining oral hygiene, and this interpretation has been upheld by the courts. See *United States v. Midway Heights County Water District*, 695 F. Supp. 1072, 1074 (E.D. Cal. 1988) ("Midway Heights").

Under the final rule published in the **Federal Register** on April 28, 1998 (63 FR 23362, at 23367), states were given two years from the date of publication to adopt the new statutory definition of public water system quoted above, or a more stringent definition, in order to obtain or maintain primacy.

B. Interpretation of "Constructed Conveyance"

As of August 6, 1998, systems that deliver water for human consumption through constructed conveyances other than pipes to the requisite number of connections and/or individuals are defined as PWSs subject to SDWA regulation. The term *constructed conveyance* is not limited by the SDWA as to the size of the conveyance or the character of the delivery system. The term refers broadly to any manmade conduit such as ditches, culverts, waterways, flumes, mine drains or canals. The term *constructed conveyance* does not include water that is delivered by bottle, other package unit, vending machine or cooler, nor does it include water that is trucked or delivered by a similar vehicle.⁵

Water bodies or waterways that occur naturally but which are altered by humans may, in some cases, be constructed conveyances. Whether a particular water body or waterway is a constructed conveyance for purposes of Section 1401(4) depends on the totality of facts that characterize whether the water body or waterway is essentially a natural water body or waterway, or whether it is essentially a manmade conduit. The primacy agency should use the following factors to decide whether a particular water body is a constructed conveyance. Specifically, the primacy agency should first decide whether a water body is manmade, or "constructed," by

work, canal maintenance, or lawn and garden care.

⁵One or more of these water delivery methods may under certain circumstances be considered public water systems under existing interpretations of other parts of the definition of a public water system.

determining whether or not it exists in its current configuration *substantially* from human modification where activities such as mining, dredging, channelization, or bed or bank modification are of an appropriate magnitude to change the character of the water body. Second, the primacy agency should determine whether the water body is a conduit, or "conveyance," by examining who owns or controls the water and the reason why water is present: whether it is present perennially through natural precipitation and runoff or discharge of natural springs, or whether its flow is present primarily by human means and in order to convey the water to users as part of a network under the management of the water supplier. If a particular water body is both "constructed" and a "conveyance" based on the factors described above, at least as to particular users whose status as "connections" is in question, the water body is a constructed conveyance.

Primacy agencies should also determine whether to consider as part of a public water system, those natural waterway portions of a water delivery system composed in part of constructed conveyances.

While irrigation-related entities and their canals are likely to be the most common systems newly defined as PWSs under the expanded definition in Section 1401(4), mining and other industrial entities that convey water may also fit within the definition if their water is used for human consumption.

C. Identification of Public Water Systems Under the Revised Definition

Primacy agencies should examine their areas of jurisdiction to determine if there are any water suppliers providing water through constructed conveyances for human consumption that meet the new public water system definition.

The addition of "constructed conveyances" to the definition of a public water system presents new questions about how to apply two key, existing components of the definition to water suppliers using constructed conveyances. A detailed discussion of these two components is provided below.

Providing Water. The first component is whether the supplier is "providing"

water within the meaning of Section 1401(4). New questions about this component arise because use of water from open conveyances may be less apparent than from piped systems. Thus, it is important to clarify those conditions under which a supplier of water through constructed conveyances would be considered to have "provided" certain users with water.

In describing a public water system, EPA's regulations and guidance use such terms as "serves" and "delivers"--often though not always in the context of "customers" (see, e.g., 40 CFR Sec. 141.2). For the supplier to be providing water to users, there must be an explicit or implied arrangement or agreement of some kind between a supplier and individuals using water. A contractual, operating or service arrangement is the most obvious example of an explicit agreement or arrangement to provide water.

Where the existence of an explicit arrangement or agreement is not obvious from the facts, the primacy agency should decide whether or not there is an implicit arrangement or agreement based on two factors: whether the supplier knows or should know that the water is being taken, and whether the supplier has consented to it being taken. A supplier that takes actions that a property owner would ordinarily take to maintain his or her property rights against unauthorized diversions should be able to demonstrate that there is no implied arrangement or agreement to "provide" water. A supplier would not be expected to go beyond its normal inspections or operation of water conveyances to discover unauthorized diversions, or to do more than those actions typically used to maintain rights against the adverse possession of interlopers to show lack of consent.

Human Consumption. The second key component of the definition, which is distinct from the component as to whether a supplier is "providing" water, is whether water is being used for "human consumption." Whether a water system is supplying water through constructed conveyances to a connection for human consumption should be determined by whether the water supplier knows or should know that users at that connection are using the supplier's water for human

consumption. In *Midway Heights*, the court held that the county water district either knew or should have known to a substantial certainty that individuals were using the district's water for human consumption based on the locations and arrangements of the pipes and plumbing, the fact that a pipe ran from the system into a number of homes, and a specific provision in an agreement between the water district and the users instructing the users to make the water potable before using it for human consumption. The court further found that a "waiver" agreement between the water district and the users that purported to limit the use of the district's water to irrigation was ineffective to remove the water system's liability under the SDWA. Likewise, EPA does not consider a waiver signed by water users stating that they must not use or are not using water for human consumption to preclude the water supplier from being considered a PWS when the system knows or should know that it is supplying water for human consumption to at least fifteen connections or an average of twenty-five regularly served individuals.

In order for water suppliers to ascertain whether they may be defined as PWSs under the revised definition, the suppliers should undertake reasonable actions within their authority to ascertain their users' water use patterns (e.g., surveys of any water users that might be using the water for human consumption). Water suppliers that make reasonable efforts to identify which of their users are using their water for human consumption will have identified all users for human consumption that they "should know" to exist, in accordance with the *Midway Heights* standard. While water suppliers should take the initiative to assess and characterize their water use situations to the primacy agency as a core element of such surveys, such suppliers can also offer their users the opportunity to describe their water use situations to the supplier. Suppliers should determine from users that might be using their water for human consumption whether the water they supply is currently used for any of the human consumptive uses outlined above, i.e., drinking, bathing, showering, cooking, dishwashing, or maintaining oral hygiene, and, if so, which such uses. Suppliers should also document whether

additional or alternative sources of water are used for human consumption, e.g., whether a private well, bottled water, or hauled water is used, and for what purposes these additional sources of water are used. Suppliers should determine and document whether the users are connected to a central treatment plant or use a point-of-entry device. Some suppliers have already performed surveys to gather information regarding their users' water use patterns.

In addition to undertaking a survey or other reasonable actions to document water use patterns, water suppliers need to consider other available information that indicates that their users are in fact using the water for human consumption. As stated above, where a water supplier knows or should know that the requisite number of connections and/or individuals are using water it supplies for human consumption, the primacy State or EPA will consider the system to be a PWS. The results of any survey and other available information should provide a basis for ascertaining whether a water supplier has at least fifteen service connections or regularly serves at least twenty-five individuals and would therefore be considered a PWS. EPA or the primacy State may wish to request documented evidence of the suppliers' reasonable efforts to ascertain these water uses. A supplier's failure to make a reasonable effort to gather any necessary information and provide sufficient documentation will not excuse the supplier from liability under the SDWA.

Primacy agencies should determine what form of records they will need from water suppliers to implement this provision. In addition to surveys, primacy agencies may want to consider requiring suppliers to submit annual affidavits documenting such information as the number of connections and users to whom they serve water, the uses of that water, and whether alternative water is supplied. Primacy agencies should also determine how often they will need updated records and how suppliers should maintain these records (e.g., schedule, location, availability).

Pursuant to its regular oversight responsibilities, EPA can review State determinations of whether a system is a PWS. If EPA has serious concerns with

the result of a State's determination, it will discuss these matters with the State regarding a potential reconsideration of the determination. In the event EPA cannot resolve the matter with the State, SDWA Section 1414 continues to authorize EPA to bring an enforcement action against a system which EPA believes is a PWS.

Under amended Section 1401(4), if a water supplier provides water for human consumption through constructed conveyances other than pipes to at least twenty-five individuals or fifteen connections at any time on or after August 6, 1998, the supplier is considered a PWS. Such a supplier may avoid regulation as a PWS only if it qualifies for the exclusions provided in Section 1401(4)(B)(i) and thereby reduces its "connections" to fewer than fifteen connections regularly serving fewer than twenty-five individuals. Information gathered in suppliers' surveys will aid the suppliers in deciding whether they may qualify for or should apply to the primacy agency for these exclusions, and in documenting their case for any such exclusions. The exclusions are described in detail in Section II below.

II. The Exclusions in Section 1401(4)(B)(i)

A. Statutory Language

Section 1401(4)(B)(i) provides limited exclusions to the "connection" component of the PWS definition to systems that deliver water through constructed conveyances other than pipes. These exclusions are not available to piped water systems, with the exception of certain piped irrigation districts described in Section 1401(4)(B)(ii) and discussed in Section III, below.

Specifically, Section 1401(4)(B)(i) provides that a connection to a system that delivers water through constructed conveyances other than pipes is excluded from consideration as a "connection" for purposes of Section 1401(4)(A) under three circumstances:

(1) Where the water is used exclusively for purposes other than residential uses (consisting of drinking, bathing, and cooking, or other similar uses);

(2) where EPA or the State (where the State has primary enforcement responsibility for PWSs) determines that alternative water to achieve the equivalent level of public health protection provided by the applicable national primary drinking water regulations is provided for drinking and cooking;

(3) where EPA or the State (where the State has primary enforcement responsibility for PWSs) determines that the water provided for drinking, cooking, and bathing is treated (centrally or by point of entry) by the provider, a pass-through entity, or the user to achieve the equivalent level of protection provided by the applicable national primary drinking water regulations.

If the application of one or more of these exclusions reduces the "connections" of a system providing water for human consumption (through constructed conveyances other than pipes) to fewer than fifteen service connections that serve fewer than twenty-five individuals, the supplier's water system is not a PWS regulated under the SDWA.⁶

However, if the supplier's remaining connections number fifteen or more, or if its remaining connections (even if they number fewer than fifteen) regularly serve at least twenty-five individuals, then the system is a PWS, although the excluded connections are not considered part of the PWS for as long as the exclusions apply and the system complies with any conditions governing their applicability.

B. Application of Section 1401(4)(B)(i)

1. The "Other Than Residential Uses" Exclusion. If water provided by a water supplier to a particular connection is used exclusively for purposes other than residential uses, consisting of drinking, bathing, and cooking, or similar uses, Section 1401(4)(B)(i)(I) applies to that connection. An example of where this exclusion would apply is when a user obtains all water for drinking, bathing, cooking, and similar uses from a private well, while the supplier provides the user

⁶The three exclusions above do not otherwise affect the manner in which primacy agencies have defined a connection for the purposes of the SDWA.

with water for toilet flushing and/or outside irrigation.

While this provision is referred to in this guidance document as one of three exclusions, it does not contain the primacy agency determination process that the other exclusions contain. This provision simply clarifies that where water being provided to a certain connection is not being used "for human consumption," that connection is not counted as a connection for purposes of the definition of a PWS in Section 1401(4).

2. *The Alternative Water and Treatment Exclusions.* In contrast to the "other than residential uses" exclusion described above, the "alternative water" and "alternative treatment" exclusions enable the primacy agency to determine that a water supplier that does meet the definition of a PWS is providing adequate health protection through the means specified in Section 1401(4)(B)(i)(II) or (III), and thus should not be regulated as a PWS.

The alternative water and alternative treatment exclusions apply only after the primacy agency has made the determination that the supplier complies with the exclusion criteria. If the primacy agency provides the supplier with a written determination that the exclusions in Sections 1401(4)(B)(i)(II) and (III) apply, then an eligible water supplier can reasonably rely on those exclusions, as long as they continue to be maintained in practice, to avoid classification as a PWS subject to the SDWA or to continue to provide users of "excluded connections" with water for human consumption that does not comply with the SDWA requirements applicable to PWSs. Suppliers seeking to exclude connections under Section 1401(4)(B)(i)(II) and/or (III) are responsible for ensuring that the primacy agency has sufficient information and documentation to demonstrate compliance with the exclusion criteria prior to the primacy agency's making a determination.

The Alternative Water Exclusion. A water supplier seeking to exclude a particular connection pursuant to Section 1401(4)(B)(i)(II) must demonstrate to the primacy agency that it is providing users at that connection with water for

drinking and cooking from another source such as bottled water or hauled water. To qualify for this exclusion the supplier must provide the water to the users, at a reasonable location, not merely make it available. Whether the alternative water provided by the supplier is being provided at a reasonable location, such as on the user's doorstep or at the property line, will be determined by the primacy agency on a case-by-case basis. The supplier must demonstrate that it is actually providing to the users a minimum amount of water adequate to meet the users' drinking and cooking needs. The statute does not require the supplier to provide alternative water to meet the users' bathing needs. The exclusion does not apply to a connection where the users, not the supplier, provide alternative water for drinking and cooking. Under the SDWA, public water systems, rather than users, are responsible for providing safe drinking water absent an explicit statutory provision to the contrary (as in the alternative treatment exclusion, discussed below).

The primacy agency must also make the factual determination that the alternative water provided for drinking and cooking actually achieves the equivalent level of public health protection provided by applicable NPDWRs.⁷ The primacy agency will make this determination based on its own criteria regarding which alternative water sources, and which associated documentation, operational, monitoring, reporting or other requirements, achieve the equivalent level of public health protection provided by applicable NPDWRs. The primacy agency should not necessarily assume that all varieties of bottled or hauled water will achieve the requisite level of public health protection absent information about the source and quality of the water. Where existing State regulations governing bottled and/or hauled water provide the equivalent level of public health protection provided by applicable NPDWRs, an alternative water purveyor's compliance with such regulations would provide adequate

assurance that the alternative water actually achieves the requisite level of public health protection.

The water supplier may charge the users for the cost of the water supplied. The water supplier may also contract with a third party to deliver the water to the user, but in such case the supplier remains responsible for ensuring that the alternative water is provided to the users.

The Treatment Exclusion. A water supplier seeking to exclude a particular connection pursuant to Section 1401(4)(B)(i)(III) must demonstrate to the primacy agency that the water that it supplies for drinking, cooking and bathing at that connection is centrally treated or treated at the point of entry by the provider, a pass-through entity, or the user. A pass-through entity is an entity other than a water supplier referred to in Section 1401(4)(B) or its users that has been contractually engaged by the water supplier or the user to provide the treatment described in Section 1401(4)(B)(i)(III). The primacy agency should request that the supplier submit information and documentation demonstrating that central treatment or a point-of-entry treatment device is actually in use and treating all water used for drinking, cooking and bathing at that connection.

The primacy agency must also make the factual determination that the treated water actually achieves the equivalent level of public health protection provided by the applicable NPDWRs.⁸ The primacy agency will make this determination based on its own criteria, which can include appropriate, independent third party (such as the National Sanitation Foundation) certification or performance verification, regarding which types of treatment devices may be used, and which associated operational, monitoring, reporting or other requirements are necessary, to ensure that the provided water actually achieves the equivalent level of public health protection provided by applicable NPDWRs. This third party verification generally describes a range of contamination levels in the raw (untreated) water that the treatment device can effectively address. Where

⁷Applicable national primary drinking water regulations means the NPDWRs that would apply to the water supplier if all its connections excluded pursuant to the alternative water and treatment exclusions were counted as connections.

⁸See footnote 7.

local variability of source water conditions indicates a need--as where the raw water is highly contaminated--primacy agencies could choose to require more site-specific pilot testing. National third party performance verification will still be helpful in such cases as a guide to the water quality parameters (levels of contamination) that will (or will not) present problems for technology performance with the type of contaminant and treatment process involved. EPA's listing of point-of-entry compliance technologies may also be helpful, as the listings may include a statement of certain limitations on the use of a specific technology for compliance that can focus primacy agencies' attention on key performance parameters.

The words "equivalent level of public health protection" are meant to distinguish the situation of providers covered by this section from the situation of public water systems which must comply with all relevant aspects of the applicable regulations, including sampling and testing requirements and sometimes details of treatment. For example, a point-of-entry treatment device for filtration and disinfection might not comply with all requirements of relevant drinking water rules for monitoring, extent of surveillance of the disinfection process, and so forth. But, it would meet the "equivalent level of public health protection" requirement of this section if the quality of the water it produces is similar to that from central filtration and disinfection. Thus, this requirement is a performance standard providing that the quality of the water that affected residential users get should be similar to that from central treatment.

As stated in Section 1401(4)(B)(i)(III), treatment may be provided by the water supplier seeking to qualify for the exclusion, by a pass-through entity, or by the user. As the alternative treatment provision explicitly states that the user may provide the treatment, the supplier may choose but is not required to put the treatment in place, operate it or contract for these services itself. However, because the exclusion cannot be granted unless the treatment actually provides an equivalent level of public health protection, as a practical matter the supplier is

responsible for ensuring that the alternative treatment is in place and remains effective to enable the primacy agency to make the necessary determination. For example, where users have already put alternative treatment in place and a supplier desires to continue this approach (that is, desires not to be involved itself in providing the alternative treatment), the supplier must provide adequate information to the primacy agency regarding the nature of the alternative treatment devices in place, including the level of health protection provided by these devices, and the existence of users' maintenance contracts that will ensure continued attainment of the required level of health protection.

III. The Exclusion in Section 1401(4)(B)(ii) for Certain Piped Irrigation Districts

All piped water systems providing water for human consumption to at least fifteen service connections or twenty-five regularly served individuals were defined as PWSs subject to SDWA regulation prior to the 1996 amendments. The amendments, however, provide a new exclusion for a specified group of these PWSs. Section 1401(4)(B)(ii) provides:

An irrigation district in existence prior to May 18, 1994, that provides primarily agricultural service through a piped water system with only incidental residential or similar use shall not be considered to be a public water system if the system or the residential or similar users of the system comply with subclause (II) or (III) of clause (i).

The exclusion provisions for qualifying piped irrigation districts were effective immediately upon passage of the 1996 amendments, in contrast with the expanded definition of public water system in Section 1401(4) as applied to constructed conveyance systems, which became effective on August 6, 1998.

An irrigation district referred to in Section 1401(4)(B)(ii) that would otherwise be defined as a PWS because it provides water for human consumption to at least fifteen connections or twenty-five regularly served individuals may avoid regulation as a PWS only if the primacy agency determines that all

connections to the district that use the district's water for human consumption comply with subclause (II) or (III) of Section 1401(4)(B)(i). In contrast to systems providing water through constructed conveyances, these districts cannot avoid regulation as a PWS by simply "reducing connections" to fewer than fifteen connections serving fewer than twenty-five individuals by application of the exclusions in subclauses (II) and (III).

Only those irrigation districts that existed prior to May 18, 1994, and which provide primarily agricultural service through piped water systems with only *incidental residential or similar use*, are eligible to apply for these exclusions. The agricultural exclusion is available for commercial agriculture only. Incidental residential or similar use refers to human consumptive uses that are closely and functionally related to the primary agricultural service provided by the irrigation district. For example, the use of water for human consumption by the residents of a farmhouse working on agricultural property, from a connection used primarily for irrigation of that property, is incidental to the primarily agricultural use of the water. Similarly, human consumptive use by farmworkers residing on agricultural property is incidental to the primary agricultural service provided to that property by the district. In contrast, the use of water for human consumption from a connection to an irrigation district's pipe by a cluster of homes in a subdivision is not "incidental" to the district's primary agricultural service. If the character of the irrigation district's service changes so that the district no longer provides primarily commercial agricultural service with only incidental residential or similar use, the district would no longer qualify for this exclusion.

As with constructed conveyances, EPA and the primacy States should recognize that irrigation districts that make a serious effort to comply with the exclusions may nonetheless have a few users who refuse to cooperate.

Questions & Answers

Q1: How can primacy agencies identify water suppliers that may be newly defined

as public water systems under the revised definition of public water system in Section 1401(4)?

A1: Primacy agencies will likely benefit by tapping into the knowledge base of their inspectors, following-up on citizen water quality complaints in irrigation and mining areas and developing inventories of irrigation and other constructed conveyance water suppliers. State agriculture departments, mining regulatory agencies and water resource departments can help develop these inventories. EPA recommends that the primacy agency send a letter to possible new PWSs informing them of the requirements of the 1996 amendments, the systems' potential SDWA responsibilities, and the systems' responsibility to determine whether and to how many of their users they are providing water for human consumption. EPA further recommends that primacy agencies suggest that the suppliers undertake reasonable actions (e.g., surveys of water users that might be using the water for human consumption) to ascertain their users' water use patterns. Primacy agencies may wish to request that water suppliers providing water through constructed conveyances other than pipes provide them with annual, affirmative documentation such as affidavits or other certifications identifying the connections and users to whom they serve water, and identifying the connections and users using their water for human consumption and residential uses. This would be a means for primacy agencies to verify suppliers' documentation of the number of connections using their water for human consumption.

Q2: Because most water suppliers cannot inspect the interiors of their users' premises, on what evidence should the suppliers reasonably base their conclusions about a user's water use?

A2: A survey of users by the supplier that includes affirmative documentation as to the types of uses made of the water would be sufficient in most cases. However, when other evidence is available to the supplier, such as the lack of potable ground water in the area, empty water bottles awaiting pick-up, observations by company personnel, or patterns of water use at that connection,

and such evidence indicates that human consumption of the water provided by the supplier is probable, such a survey should not be treated as conclusive.

Q3: Some water suppliers have warned their users that their water is nonpotable or is not for human consumption without treatment. Some have offered the water for sale only on the condition that it will not be used for human consumption. Other suppliers have required their users to sign statements that the water will not be used for human consumption or that the supplier is not liable (and the user assumes the risks) if the water is used domestically. If, nevertheless, a user uses water for human consumption in the face of these or similar conditions, must the water supplier count the user as a connection for the purposes of Section 1401(4)?

A3: Yes, in cases where the water supplier is delivering water that the suppliers knows or should know is being used for human consumption.

Q4: Where a water supplier provides water for human consumption through pipes or other constructed conveyances, does the geographic isolation of that water supplier's users affect whether such users are counted as connections or individuals served by the supplier?

A4: No. All water users to whom the water supplier provides water for human consumption are counted as connections or individuals served by the supplier regardless of their geographic isolation from other users, unless such connections are otherwise excluded pursuant to Section 1401(4)(B).

Q5: Are the exclusions in Section 1401(4)(B)(i) available to a water supplier that operates a system that consists primarily of non-piped constructed conveyances, but which includes some limited "piping" such as siphons to pass under roads or washes, short tunnels through hills, etc.?

A5: Yes, assuming the exclusion criteria apply. Only those suppliers that convey water by means other than pipes, and which are newly defined as public water systems under the expanded definition in Section 1401(4)(A), may use the exclusions available under Section 1401(4)(B)(i) to avoid regulation as a public water system. Suppliers whose piping consists only of the limited piping

described above are not considered to convey water by pipes. A primacy agency should not make a determination that a supplier is a piped water system, either as to specific connections or entirely, if it would not have been able to do so under SDWA prior to the changes enacted to Section 1401(4). It should be noted that Section 1401(4)(B)(ii) provides a separate exclusion to a specified group of piped irrigation districts, as discussed in Section III above.

Q6: If a water supplier delivers water for human consumption through a constructed conveyance other than a pipe and reduces its number of countable connections through the operation of 1401(4)(B)(i) to 15 connections using water for human consumption does it have to supply SDWA-complying water only to these 15 connections or to all of its connections?

A6: The water supplier is under an obligation to supply SDWA-complying water only to the 15 connections.

Q7: Is an irrigation district in existence prior to May 18, 1994 that provides primarily agricultural service through a piped water system with only incidental residential or similar use to at least fifteen service connections or twenty-five regularly served individuals considered to be a public water system if only some of its connections for human consumption are provided with alternative water or alternative treatment in accordance with subclause (II) or (III) of clause (i)?

A7: Yes. All connections to this kind of public water system using the water for human consumption must comply with subclause (II) or (III) of clause (i) before the supplier will not be considered a public water system.

Q8: Is the irrigation district described in Question 7 above under an obligation to comply fully with SDWA with regard to just the connections for human consumption that are not provided with alternative water or alternative treatment or to all of its connections using water for human consumption?

A8: The water supplier must comply fully with SDWA with regard to all of the connections to the public water system using water for human consumption.

Q9: What financial options are available to water suppliers that were newly defined as PWSs as of August 6,

1998 under the expanded definition of PWS in Section 1401(4) and to suppliers that wish to make use of the exclusions in Section 1401(4)(B)?

A9: There are various financial options available to those water suppliers. First, public water systems are eligible for Drinking Water State Revolving Fund loans--with subsidies available to disadvantaged communities. Even those water suppliers that wish to exclude connections through use of point-of-entry treatment or central treatment pursuant to Section 1401(4)(B)(i)(III) are eligible for these loans to provide such treatment. In addition, some communities known as ``colonias" may be eligible for assistance through federal grants to border States intended to provide assistance to such communities to facilitate compliance with SDWA requirements, although such grant funding has not previously been appropriated for this purpose. Finally, water suppliers providing alternative treatment have all the financial options regarding amortization and charging costs to users they would have for any other capital investment.

(Authority 42 U.S.C. Sec. 300f(4))

[FR Doc. 98-20904 Filed 8-4-98; 8:45 am]

BILLING CODE 6560-50-P

Disclaimer

This document provides guidance to EPA Regions and States exercising primary enforcement responsibility under the SDWA concerning how EPA interprets the amended definition of public water system under the SDWA. It also provides guidance to the public and the regulated community on how EPA intends to exercise its discretion in implementing the statute and regulations defining public water system. The guidance is designed to implement national policy on these issues. The document does not, however, substitute for the SDWA or EPA's regulations, nor is it a regulation itself. Thus, it cannot impose legally-binding requirements on EPA, States, or the regulated community, and may not apply to a particular situation based upon the circumstances. EPA and State decisionmakers retain the discretion to adopt approaches that differ from this guidance on a case-by-case basis where appropriate. EPA may change this guidance in the future.